No. 91-2042

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SCOTT P. FAGG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondent's Brief in Opposition alleges that the age of the petitioner's girlfriend with whom he had private, heterosexual, noncommercial, consensual, adult, oral sex somehow defeats the constitutional infirmity of Article 125's blanket prohibition of all sodomy, either married or unmarried.[1] Such a reply is perplexing and irrelevant to the proper resolution of the question presented and whether a writ of certiorari should be issued in this case.

First, the issue in this case is *not* the constitutionality of Article 125 as applied to sodomy between minors and

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[1] As noted in the petitioner's Petition for a Writ of Certiorari at 9, the reversal by the Court of Military Appeals of the Air Force Court of Military Review's decision constitutionally limiting Article 125's broad reach effectively criminalized marital oral sex.

adults, as the respondent's entire Brief in Opposition pretends.[2] Indeed, the respondent's position before this Honorable Court is directly contrary to its position before the Court of Military Appeals. There, while framing the issues which that Court was then required by law to review,[3] the respondent recognized that the constitutional issue in this case was the correctness of the Air Force Court of Review's holding of a "constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting *adults.*" *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992) (emphasis added).[4] The respondent, throughout his appeal below, correctly recognized that the 18-year-old petitioner was charged with, and convicted of, *adult* consensual oral sex with his 16-year-old girlfriend. In fact, as the Air Force Court of Military Review specifically noted, the appellant's girlfriend, Ms. Coltman, was an adult under military law. *United States v. Fagg*, 33 M.J. 618, 619 (A.F.C.M.R. 1991) *citing* Manual for Court-Martial (MCM), Part IV, paragraph 51b(2) (1984) (establishing particular aggravation for sentencing under Article 125 if the act occurs with "a child under the age of 16.") That is the law of this case. Parenthetically, the potential punishment the appellant would have faced if his girlfriend would have been a "minor" would have increased from 5 to 20 years. MCM, Part IV, paragraph 51(e) (1984).

Second, the question presented by the petitioner in no manner can be construed as a constitutional attack on

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[2] The respondent's attack on the Navy-Marine Corps Appellate Defense's Amicus misses the mark for the same reason.

[3] *See infra* n. 7, 8.

[4] This Honorable Court's recent decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) lends support to the correctness of the Court of Review's holding. There, this Court recognized that "our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 112 S. Ct. at 2807 (citation omitted).

Article 125's prohibition of sodomy with a minor child. The Air Force Court of Military Review's *orbiter dictum* found constitutional Article 125's prohibition against sodomy where minors were involved. Indeed, the Court of Military Review further noted that "the government's interest in prosecuting such acts is clear." 33 M.J. at 620. The Air Force Court of Military Review found unconstitutional only those private, heterosexual, non-commercial, consensual adult sex acts for which the government does not have a compelling interest to regulate and thus prosecute under Article 125. This was the holding which was reversed by the Court of Military Appeals, giving rise to the petitioner's question presented.

Third, contrary to the respondent's contention, the 18-year-old petitioner's 16-year-old girlfriend was not a "minor" under Oklahoma law with regard to her dating relationship wherein she voluntarily engaged in oral sexual activity with the petitioner. In fact, under Oklahoma law, 16-year-olds and their partners can engage in sexual activity more involved than oral sex—actual intercourse—without criminal approbation. Okla. Stat. Ann. tit. 21, § 1111(A)(1) (1991).[5] Thus, it is illogical to asert that somehow oral sex between teenagers who are 16 years of age or older is prohibited by the State of Oklahoma, or that the teenage petitioner, by dating Ms. Coltman, was contributing to her delinquency.[6] In fact,

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[5] Indeed, the petitioner and Ms. Coltman did engage in consensual intercourse when they were 18 years- and 16 years-of age, respectively, and in doing so, violated neither military nor Oklahoma law. Contrary to respondent's assertion that petitioner contributed to the delinquency of a minor, Ms. Coltman's mother, at the pretrial hearing in this case, testified that she was aware that the petitioner and Ms. Coltman were having sexual relations, and that she even told Ms. Coltman to tell her when she needed birth control pills. I.O.X. 15.

[6] Okla. Stat. Ann. tit. 10, § 1101(1), referenced by respondent, deals not with age at which sexual conduct is proscribed, but with the age at which a person falls under the jurisdiction of juvenile court. In this regard, 16-year olds can be prosecuted as adults if

at petitioner's trial, Ms. Coltman's mother submitted a letter to the military judge which noted that she would have no qualms having the petitioner as a son-in-law. DX. F.

Finally, the petitioner notes, in response to the respondent's waiver argument, that the genesis of the Fifth Amendment lack-of-notice due process and equal protection issues in this case was the Court of Military Appeals decision below. Unlike the case in *Solorio v. United States*, 483 U.S. 435, 451, n.18 (1987), cited by respondent, Brf. at 7, in which this Court declined to consider a claim not raised by Solorio in the Court of Military Appeals, in the case at bar it was the *respondent* who, as a matter of right,[7] appealed and framed the issues addressed by the Court of Military Appeals below.[8] Accordingly, the

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charged with a felony. Similarly, Okla. Stat. Ann. tit. 15, § 13, also referenced by respondent, deals with the ability of persons under 18 to delegate power and to enter into real estate and other types of contracts.

[7] 10 U.S.C.A. § 867(b)(2) (West Supp. 1991) (Article 67(b)(2) of the Uniform Code of Military Justice), requires the Court of Military appeals to review all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review.

[8] The issues framed and certified for mandatory review to the Court of Military Appeals by The Judge Advocate General of the Air Force pursuant to 10 U.S.C.A. § 867(b)(2) (West Supp. 1991):

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT RECOGNIZED A "CONSTITUTIONAL ZONE OF PRIVACY FOR HETEROSEXUAL, NONCOMMERCIAL PRIVATE ACTS OF ORAL SEX BETWEEN CONSENTING ADULTS," THEREBY SETTING ASIDE AN ARTICLE 125 SODOMY CONVICTION.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT HELD THAT THERE MUST BE A COMPELLING GOVERNMENTAL INTEREST IN ORDER TO SUSTAIN A CONVICTION UNDER ARTICLE 125

Fifth Amendment constitutional infirmities which were eventually embedded in the Court of Military Appeals' holding below are properly presented for this Honorable Court's consideration.

Alternatively, this Honorable Court should address these constitutional issues found in the Court of Military Appeals' decision below because of the nature of this case. In addition to the fact, discussed *supra*, that it was the respondent who appealed and framed the issues for mandatory review by the Court of Military Appeals, the petitioner is keenly aware of this Court's jurisdiction to decide issues not presented below. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). *See also Youakim v. Miller*, 425 U.S. 231 (1976). Moreover, the complained-of issues were presented in the petition for certiorari, and were addressed by the Brief in Opposition,[9] so there is no danger of appellate surprise or eroding the "integrity of the process of certiorari," *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992). Finally, the Fifth Amendment due process and equal protection concerns were squarely raised by the Court of Military Appeals' decision both in the instant case, as well as in the petitioner's companion case *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992) cited extensively by the Court of Military Appeals. *Fagg*, 34 M.J. at 179-80. These issues concern all service members, both male and female, married and unmarried. Furthermore, because service member petitions for writ of certiorari to this Honorable Court are

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FOR A PRIVATE, HETEROSEXUAL, NON COMMERICAL, CONSENSUAL ADULT ORAL SEX ACT.

Fagg, 34 M.J. at 179.

[9] This case is thus distinguishable from *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992), which was cited by respondent. Brf. at 7. *Taylor* dealt with an attorney who raised an argument "for the first time in his opening brief on the merits," after certiorari was granted. 112 S. Ct. at 1649.

contingent on discretionary grants of review by this Court of Appeals,[10] it is extremely unlikely that these constitutional issues will ever again be presented for review by this Honorable Court.[11]

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[10] 10 U.S.C.A. § 867a (West Supp. 1991); 28 U.S.C.A. § 1259 (West Supp. 1991).

[11] Petitioner stands by his Petition for Writ of Certiorari with regard to the respondent's substantive argument on the Fifth Amendment's notice and equal protection issues. Nevertheless, Petitioner would specifically note his strong exception with the respondent's assertion that the petitioner "had adequate notice that his conduct could be punished under the UCMJ." It is difficult to assume, in light of the dearth of prosecutions of other service members similarly situated, that the petitioner would have known that his conduct was criminalized. As highlighted by the Air Force Court of Military Review, "in the many Article 125 prosecutions that this Court has reviewed, none has resulted from a fact situation as unaggravated as the appellant's. *Fagg*, 33 M.J. at 621. Moreover, as illustrated by the Navy-Marine Corps Appellate Defense Division's *amicus*, there exists serious doubt as to whether heterosexual oral sex acts even fall within the ambit of Article 125's criminal prohibitions.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Honorable Court should grant the writ.

Respectfully submitted,

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